

BEFORE THE TEACHERS' RETIREMENT BOARD  
OF THE STATE OF MONTANA

|  |   |                      |
|--|---|----------------------|
| In the matter of the amendment of ARM    | ) | NOTICE OF PROPOSED   |
| 2.44.308, 2.44.412, 2.44.413, 2.44.414,  | ) | AMENDMENT AND REPEAL |
| 2.44.517A, 2.44.518, and 2.44.527, and   | ) |                      |
| repeal of ARM 2.44.505 and 2.44.511      | ) |                      |
| pertaining to Independent Contractors,   | ) | NO PUBLIC HEARING    |
| Calculating Service Credits, Termination | ) | CONTEMPLATED         |
| Pay, Earned Compensation, Benefit        | ) |                      |
| Adjustments                              | ) |                      |

TO: All Concerned Persons

1. On December 27, 2007, the Teachers' Retirement Board proposes to amend and repeal the above-stated rules.

2. The Teachers' Retirement Board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Teachers' Retirement System (TRS) no later than 5:00 p.m. on November 12, 2007, to advise us of the nature of the accommodation that you need. Please contact Rita Karnopp, Teachers' Retirement System, P.O. Box 200139, Helena, Montana 59620-0139; telephone (406) 444-3754; fax (406) 444-2641; TDD/TTY (406) 444-1421; or e-mail rkarnopp@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

2.44.308 INDEPENDENT CONTRACTOR (1) Any person employed as an independent contractor shall be ineligible for membership in the ~~teachers' retirement system TRS~~. Certification from the Montana Department of Labor and Industry pursuant to 39-71-401, MCA, as an independent contractor shall be accepted as prima facie evidence of independent contractor status by the Teachers' Retirement Board.

(2) In absence of certification by the Department of Labor and Industry, it must be shown that the worker is both free from direction and control of the party utilizing their services and have an independently established business. ~~The burden of proof before the teachers' retirement board is on the employer.~~

(3) If a person's status as an independent contractor is in question, they must become a member of the ~~teachers' retirement system TRS~~ as provided under 19-20-302, MCA. The burden of proof before the Teachers' Retirement Board is on the employer. Upon request, the employer will submit to the Teachers' Retirement Board a copy of the independent contractor certification issued by the Department of Labor and Industry for any contractor employed in a position normally eligible for membership under the TRS.

AUTH: 19-20-201, MCA  
IMP: 19-20-302, MCA

Reasonable Necessity: Simply "labeling" a person an independent contractor is not determinative of that status - control is. Tax Counsel, Ice Miller, advised that if independent contractor status is not evaluated under standards at least as restrictive as the Internal Revenue Service's test of independent contractor status that the TRS could be at risk of losing its qualified plan status. Changes are necessary to ensure compliance with regulations governing public pension plans.

2.44.412 VETERANS CALLED TO ACTIVE DUTY (1) Members of the ~~teachers' retirement system TRS~~ called to active duty for a period not to exceed five years and ~~reinstated,~~ reemployed in accordance with the provisions of the Vietnam Era Veterans' Readjustment Act of 1974 Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, ~~to a position eligible for membership under the teachers' retirement system~~ shall be considered continuously employed during their military leave when determining vested interest and eligibility for retirement benefits.

(2) ~~Reinstated~~ Reemployed veterans may elect to purchase creditable service for their military leave to be used in the calculation of retirement benefits. The cost to purchase this service shall be equal to the employee contributions that would have been made had they not been called to active duty. Interest accruing on the balance due to purchase active duty service will not be levied during the ~~first year~~ five years following the date of ~~discharge~~ reemployment. If payment is not completed within ~~one year~~ five years following ~~discharge~~ reemployment, interest will be assessed as provided under ARM 2.44.405.

(3) To qualify for service under this rule, the member called to uniformed service must remain an inactive member of the retirement system during the period of service in the uniformed services by leaving his or her accumulated contributions on deposit.

(4) A member who is making additional contributions under a service purchase contract at the time he or she is called to service in the uniformed services may suspend payments under the contract if they return to employment as required by the Act.

AUTH: 19-20-201, MCA  
IMP: 19-20-415, MCA

Reasonable Necessity: The Federal Uniformed Services Employment and Reemployment Rights (USERRA) Act of 1994, is an update to the Vietnam Era Veteran's Readjustment Act. Members called to active duty, upon return to employment covered under the TRS are eligible to qualify any service and benefits lost while serving in a branch of the uniformed services. The changes proposed are necessary to comply with the current provisions of USERRA. In addition, extraneous verbiage needs to be eliminated for the purpose of clarity and we have proposed that.

2.44.413 CREDITABLE SERVICE FOR MEMBERS AFTER JULY 1, 1989-  
ACTUARIAL COST (1) The actuarial cost to purchase creditable service by ~~members who first became members on or after July 1, 1989,~~ will vary by the member's compensation, age, and years of service at the time they apply or are eligible to purchase the additional service.

(a) The total compensation reported to the ~~teachers' retirement system~~ TRS for the most recent fiscal year or the member's average final compensation, whichever is greater, will be used to determine the actuarial cost.

(b) remains the same.

(c) The years of service used in the formula to determine the actuarial cost ~~will be determined by~~ include the total number of years of creditable service the member is eligible to ~~receive~~ purchase on the date they apply or are eligible to purchase service under this rule.

(2) Service will be credited to the member's account at the time they have completed payment in full. If the member retires or dies prior to completing payment in full, purchasable service terminates ~~payments or advises the TRS that they will not make any further payments, the service purchased~~ will be credited on a prorated basis.

AUTH: 19-20-201, MCA

IMP: Title 19, chapter 20, part 4, MCA

Reasonable Necessity: The rule catchphrase does not adequately reflect the purpose of the rule. In addition, extraneous verbiage needs to be eliminated for the purpose of clarity. It is also necessary to make changes to comply with IRS Private Letter Ruling received March 3, 1999. Members electing to purchase service under the provisions of 19-20-415, MCA, and who have signed an irrevocable election to purchase that service, may only stop payroll deductions upon termination of employment in all positions reportable to the Teachers' Retirement System.

2.44.414 INSTALLMENT PURCHASE (1) If a member signs a ~~revocable~~ an irrevocable payroll deduction authorization and subsequently ~~reduces the monthly payment amount or terminates monthly payments before the terms of the contract are fulfilled, the member's account will be credited with the prorated portion of the service purchased to date.~~

(2) ~~The~~ terminates employment, the cost to purchase the balance of the remaining service will be recalculated at the time the member, ~~if eligible,~~ reapplies to purchase the balance of the service. ~~Interest will be included at the rate set by the board.~~

AUTH: 19-20-201, MCA

IMP: ~~19-20-401, 19-20-402, 19-20-403, 19-20-404, 19-20-405, 19-20-406, 19-20-407, 19-20-408, 19-20-409, 19-20-410, 19-20-411, 19-20-414, 19-20-415, 19-20-416, 19-20-417, 19-20-426, 19-20-427,~~ MCA

Reasonable Necessity: The proposed changes are necessary because federal law governing the purchase of service under an irrevocable agreement

prohibits the reduction or termination of payments until the terms of the contract are fulfilled, or the individual terminates employment. In addition, extraneous verbiage needs to be eliminated for the purpose of clarity.

2.44.517A REPORTING OF TERMINATION PAY (1) A completed and signed Termination Pay Form together with the employee and employer contributions due must be received by the ~~teachers' retirement system~~ TRS by the 15th of the month, following the month in which the employee terminated employment. Only termination pay that is paid at the time of termination and retirement is reportable to the TRS.

(2) Tax deferred contributions remitted by an employer cannot exceed the total termination pay amount payable to the employee. Any contributions due that are greater than the termination pay amount payable to the employee cannot be picked up by the employer.

(3) Interest will be assessed at the actuarially assumed rate on employee and/or employer contributions ~~received after the 15th~~ over 30 days delinquent.

~~(3) The member and their employer will be notified in writing when contributions due on termination pay are over 30 days past due.~~

(4) If contributions on termination pay are not received within 60 days of the effective date of retirement, monthly benefits calculated using termination pay ~~will~~ may be recalculated and adjusted retroactive to the date of retirement.

(5) If the member submits the employee contributions due but the employer refuses or does not timely remit the employer contributions due, the member will be given ~~an additional~~ 30 days to work with the employer to remit contributions due before benefits will be recalculated.

(6) The retiree and their employer will be notified in writing prior to assessing interest on unpaid contributions, or recalculating retirement benefits.

AUTH: 19-20-201, MCA

IMP: 19-20-101~~(5)~~, 19-20-716, MCA

Reasonable Necessity: Proposed amendments are necessary to clearly state the procedures for the collection of delinquent contributions on termination pay and assessment of interest, conditions under which benefits may be recalculated, and to provide for notification to members. Collections of this sort are necessary.

2.44.518 LIMIT ON EARNED COMPENSATION-10% CAP (1) The earned compensation for each year used in calculating a member's average final compensation may not exceed either the member's actual earned compensation or earnings adjusted by this rule for the preceding year, by more than 10% except for increases that result from:

(a) ~~result from~~ collective bargaining agreements;

(b) ~~have been granted by the employer to all other similarly situated employees~~ a change or adjustments in a salary schedule covering a certifiable group of employees not covered under a collective bargaining agreement. The employer must certify the ~~similarly situated~~ group of employees affected by the change or

adjustment in the salary schedule, the increase received by each employee, and the methodology for determining the increases;

(c) ~~result from~~ compensation received for summer employment, provided summer compensation does not exceed the lesser of:

(i) one-ninth of the academic year contract for each full month or prorated for each portion of a month employed during the summer; or

(ii) ~~110% of the summer compensation the member was eligible to earn each month during the preceding summer;~~

(d) ~~have resulted from~~ change of employer; or

(e) ~~have resulted from~~ re-employment for a period of not less than one year following a break in service;

(f) a promotion to an existing permanent position with the same employer.

The assignment of temporary duties or a new job added to existing duties, an acting or interim appointment, a change in classification or title, or an increase in compensation received would not qualify as a promotion; or

(g) the combination of salary from multiple employers that when reviewed separately does not exceed 10%.

(2) and (2)(a) remain the same.

(b) official minutes of board meetings;

(c) collective bargaining agreements; or

(d) salary schedules.

(3) remains the same.

(4) ~~The 10% cap shall be calculated as per the following example and applied consistently to all members:~~

|   | <del>FY 1996</del>     | <del>FY 1997</del>     | <del>FY 1998</del>      | <del>FY 1999</del>      |
|---|------------------------|------------------------|-------------------------|-------------------------|
| <del>BASE CONTRACT</del>                  | <del>\$64,750.00</del> | <del>\$70,230.00</del> | <del>\$90,000.00</del>  | <del>\$90,000.00</del>  |
| <del>10% CAP</del>                        | <del>NA</del>          | <del>NA</del>          | <del>77,253.00</del>    | <del>84,978.00</del>    |
| <del>EXCESS BASE EARNINGS</del>           | <del>NA</del>          | <del>NA</del>          | <del>-12,747.00</del>   | <del>5,022.00</del>     |
| <del>SUMMER COMPENSATION (3 months)</del> | <del>21,583.00</del>   | <del>23,700.00</del>   | <del>30,000.00</del>    | <del>20,000.00</del>    |
| <del>SUMMER 10% CAP</del>                 | <del>NA</del>          | <del>23,410.00</del>   | <del>25,751.00</del>    | <del>NA</del>           |
| <del>EXCESS SUMMER EARNINGS</del>         | <del>NA</del>          | <del>290.00</del>      | <del>4,249.00</del>     | <del>NA</del>           |
| <del>TOTAL EXCESS</del>                   |                        | <del>\$22,308.00</del> |                         |                         |
| <del>AVERAGE FINAL COMPENSATION</del>     |                        | <del>\$93,640.00</del> | <del>\$103,004.00</del> | <del>\$104,978.00</del> |

Average final compensation is equal to total compensation less excess earnings not qualifying for an exemption.

AUTH: 19-20-201, MCA

IMP: 19-20-101(5), 19-20-715, MCA

Reasonable Necessity: ARM 2.44.518 is proposed to be amended to eliminate extraneous verbiage for the purpose of clarity. In addition, the stricken language is over restrictive and in some instances may go beyond the statement of intent attached to the original legislation. The board has added an exemption for permanent promotions to existing positions. It is the board's intent to limit the exemption for promotions to a permanent change in positions without recourse to return to a previous position, as opposed to a temporary promotion and/or assignment of additional duties, and to limit this exemption to promotions to a preexisting position and not to a new position created in the final years preceding the member's retirement. The example has been deleted because it is not possible to include an example that covers most or even a typical situation, making any single example less useful and confusing.

2.44.527 PAYMENT FOR SERVICE - CALCULATION OF RETIREMENT BENEFITS (1) ~~All payments for the purchase of service credits must be completed by the 15th of the month in which the member retires.~~

(2) ~~If payment~~ If the final payment due to purchase service credits is over 30 ~~60~~ days past due, the member ~~and their employer~~ will be notified in writing that contributions, plus accrued interest, are due and payable; and that benefits will be recalculated and ~~adjusted~~ corrected retroactive to the date of retirement if payment is not received within ~~60~~ 30 days of ~~the effective date of retirement~~ notification.

AUTH: 19-20-201, MCA

IMP: 19-20-801, 19-20-901, 19-20-1001, MCA

Reasonable Necessity: The failure to contribute the amounts necessary to purchase additional service should result in recalculation of retirement benefits as soon as possible before the system suffers any significant loss. The rule is necessary to clarify the time lines for notification, and when benefits will be adjusted.

4. The rules proposed for repeal are as follows:

2.44.505 ELIGIBILITY FOR SURVIVOR BENEFITS located at page 2-3263, Administrative Rules of Montana. This rule would not be replaced.

AUTH: 19-20-201, MCA

IMP: 19-20-1001, MCA

Reasonable Necessity: The substantive language is included in 19-20-1001, MCA.

2.44.511 REINSTATEMENT OF BENEFITS located at page 2-3265, Administrative Rules of Montana. This rule would not be replaced.

AUTH: 19-20-201, MCA

IMP: 19-20-302, 19-20-731, MCA

Reasonable Necessity: The substantive provisions of ARM 2.44.511 can be found in 19-20-731, MCA.

5. Concerned persons may submit their data, views, or arguments concerning the proposed actions in writing to: David L. Senn, Teachers' Retirement System, P.O. Box 200139, Helena, Montana 59620-0139; telephone (406) 444-3376; fax (406) 444-2641; or e-mail dsenn@mt.gov, and must be received no later than 5:00 p.m., November 23, 2007.

6. If persons who are directly affected by the proposed actions wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to David L. Senn at the above address no later than 5:00 p.m., November 23, 2007.

7. If the agency receives requests for a public hearing on the proposed actions from either 10% or 25, whichever is less, of the persons directly affected by the proposed actions; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of the persons directly affected has been determined to be 3,890 persons based on the total active, inactive, and retired membership of the Teachers' Retirement System.

8. The Teachers' Retirement System maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Such written request may be mailed or delivered to the contact person in paragraph 2 above or may be made by completing a request form at any rules hearing held by the Teachers' Retirement System.

9. An electronic copy of this Proposal Notice is available through the Teachers' Retirement System's web site at [www.trs.mt.gov](http://www.trs.mt.gov). The TRS strives to make the electronic copy of this notice conform to the official version of the notice as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

10. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

/s/ Dal Smilie  
Dal Smilie  
Rule Reviewer

/s/ David L. Senn  
David L. Senn  
Executive Director  
Teachers' Retirement System

Certified to the Secretary of State October 15, 2007.